

Before the
Federal Communications Commission
Washington, DC 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)

AJI Broadcasting, Inc.)

MM Docket No. 96-92

Order to Show Cause Why the License)
for Station KYEG(FM), Canadian, Texas,)
Should Not Be Revoked)

To: Administrative Law Judge
Edward Luton

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MASS MEDIA BUREAU'S REPLY TO
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Roy J. Stewart
Chief, Mass Media Bureau

Norman Goldstein
Chief, Complaints and Political
Programming Branch

Mark L. Berlin
Attorney
Mass Media Bureau

Federal Communications Commission
2025 M Street, NW
Suite 8202
Washington, DC 20554
(202) 418-1423
October 8, 1996

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I. Preliminary Statement

1. On September 24, 1996, AJI Broadcasting, Inc. ("AJI") filed Proposed Findings of Fact and Conclusions of Law ("PFCs") in this proceeding. The Mass Media Bureau hereby replies to those PFCs. The Bureau's failure to reply to any particular finding or conclusion contained in AJI's PFCs should not be construed as a concession to its accuracy or completeness. The Bureau submits that its own proposed findings of fact are an accurate and complete presentation of the relevant record evidence and that its conclusions of law properly apply Commission precedent to the facts of this proceeding.

II. Reply Findings

Proposed Findings

2. At paragraph 5 of its PFCs, AJI states that when the Commission granted AJI's July 20, 1995 request for special temporary authority ("STA") to remain silent, the staff "acknowledg[ed] that the delay in returning Station KYEG(FM) to broadcast operations was the result of Inman's ¹ health problems." While the staff did initially accept that reasoning in the context of the STA, it subsequently discounted that fact in denying AJI's application for extension of time to construct modified facilities. In that decision the staff noted that Inman's physician had certified that, as of April 4, 1995, Inman was able to "resume his normal daily activities." (AJI Ex. 1, Attach. 1). Consequently, the staff refused to allow Inman's health problems to excuse his continuing failure to construct the station and cancelled his

¹ A. Jack Inman is AJI's sole officer, director and stockholder.

construction permit to modify the station's facilities. (MMB Ex. 1, Attach. 4). The Presiding Judge therefore should not allow Inman's earlier poor health to excuse his failure to construct the station over the past 18 months since April 1995.

3. The Bureau urges the Presiding Judge to ignore Exhibit 1 to AJI's PFCs, which consists of an inter-office memorandum dated March 25, 1996, from Laura Smith to Alma Hughes, and a letter dated February 10, 1996, from William Pennington, the licensee's counsel, to the Commission. Both refer to the consummation of the assignment of the station's license from Carolina Communications to AJI. Neither the memorandum nor the letter was introduced into evidence in the hearing, and AJI has not sought their introduction through a motion to reopen the record, nor has AJI requested judicial notice of their content. For the same reason, the Bureau also urges the Presiding Judge to ignore footnote 4 of AJI's PFCs, which refers to Exhibit 1.

4. At paragraph 18 of its PFCs, AJI states that "Texrock ² has a financial commitment letter from RJ Financial, Incorporated ("RJ Financial"), which is its primary source of funding." The Presiding Judge, however, has already disallowed the introduction of that letter into evidence after concluding that the letter gave no assurance of funds and was of "no probative value on any issue in the case." (Tr. 46-47). The Presiding Judge should therefore ignore any reference to RJ Financial's letter.

² Texrock, Inc. is the entity upon which AJI is currently relying for financing to construct the station.

5. At paragraph 19, AJI indicates that Dain Schult ("Schult"), the president of Texrock, had negotiated a verbal commitment of "bridge money" totalling \$100,000 from Dan Hodges ("Hodges"), an investment banker from Tucson, Arizona, but neither AJI nor Schult has demonstrated that Hodges has the ability to make such a loan. Consequently, the Presiding Judge should not consider such funds as being available.

Conclusions of Law

6. At paragraph 27, AJI cites *Keyboard Broadcasting Communication*, 10 FCC Rcd 4489 (MMB 1995), for the proposition that even an effort as meager as AJI's should be rewarded. In that case, the licensee was designated for hearing on issues similar to the ones here. The Administrative Law Judge, however, terminated the hearing and certified the case to the Commission after the licensee failed to file a notice of appearance. Subsequently, the licensee informed the Commission that it had taken remedial action and had returned the station to the air, and the Bureau concluded that it would be appropriate to terminate the revocation proceeding without any action on the license being taken. The Bureau based its decision on "the substantial efforts and resources expended by Keyboard to return WCSA(AM) to the air and the successful resumption of and continuing operation of" the station. Suffice it to say, AJI has not yet managed to return KYEG to the air. Consequently, *Keyboard* is inapposite.

7. At paragraphs 23-26 of its PFCs, AJI maintains that, with funds provided by Texrock, it can construct the station and return it to the air. AJI's conclusion is based on the assumption that Texrock itself has the necessary funds. Schult testified, however, that Texrock did not then have the funds on hand to meet the amount of its proposed loan to AJI and that he was awaiting funding from a third party. (Tr. 93-94). The record in this proceeding, however, does not reflect that Texrock has obtained the required funds. Consequently, the Presiding Judge must conclude that AJI cannot rely on Texrock for funds and, therefore, that AJI does not have the financial capability to construct the station.

8. AJI, in its Summary on page ii and again in paragraph 43 of its PFCs, admits that it twice violated Section 73.1740 of the Commission's Rules by remaining off the air without authority, once for four months and again for six and one-half months. In calculating the second lapse, AJI starts at October 1, 1995, and ends on April 12, 1996, when the Hearing Designation Order establishing this hearing was adopted. In reality, however, that second lapse is on-going. AJI never sought an extension of its STA to remain silent after its authority to do so expired on October 1, 1995, so the period is now 12 months - and running. AJI blames the first lapse (from April until August, 1995) on Inman's poor health and the second on his preoccupation with attempting to obtain the necessary financing and engineering services. AJI's own exhibit, however, refutes AJI's first contention, since Inman's physician certified that, as of April 4, 1995, he was able to "resume his normal daily activities." (AJI Ex. 1, Attach. 1). AJI's excuse for the second lapse is also not valid. AJI's primary focus should have been to return the station to the air. To state that he was doing

that which he was already supposed to do is no excuse for failing to seek an extension of the STA to remain silent. The plain fact is that AJI simply ignored Section 73.1740 and allowed its STA to expire.

9. Beginning at paragraph 38 of its PFCs, AJI cites *Cavan Communications* ("*Cavan*"), 10 FCC Rcd 2873 (ALJ 1995), for the proposition that, despite a licensee's repeated violations of Section 73.1740, revocation of a station's license is not warranted. In that case, however, the Presiding Judge found that the licensee had the capability and intent to expeditiously resume broadcast operations, and he did not choose to revoke the station's license for violation of Section 73.1740 alone. Nevertheless, he did impose a forfeiture on the licensee for its "wholly inexcusable" violations of the Rule. *Cavan* at p. 2876. Here, revocation of AJI's license for the rules violations is warranted. For the same reason, AJI's citation in paragraph 42 of *Video Marketing Network, Inc.*, 10 FCC Rcd 7611 (MMB 1995), is inapposite.

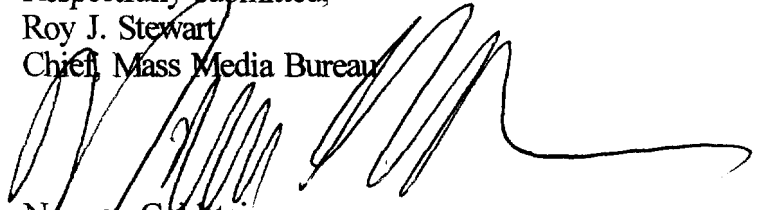
10. At paragraph 41 of its PFCs, AJI cites *Hometown Media, Inc.* ("*Hometown*"), FCC 96D-06 (ALJ, released September 17, 1996), for the proposition that a licensee demonstrating the capability and intent to resume broadcast operations expeditiously cannot be deemed to have violated Section 73.1750 of the rules by permanently discontinuing operations. That recent decision, however, is still subject to appeal. Moreover, because it is a decision of an Administrative Law Judge, it is not binding in this proceeding.

11. At paragraph 31 of its PFCs, AJI maintains that it did not violate Section 73.1750 of the Rules because it was not responsible for discontinuing the operation of the station. That, it contends, was done by its predecessor in 1991. AJI further argues that it has acted diligently to return the station to the air. While it is true that KYEG was already silent when AJI acquired it in February 1995, AJI's failure to return it to the air was a continuing violation of the rule. Moreover, the occurrence of two events served to transform AJI into the entity responsible for the permanent discontinuance of service and violation of Section 73.1750. The first was AJI's failure to comply with the condition imposed on its license that it return the station to the air within 60 days of its consummation of the assignment of license, and the second was the point at which AJI no longer had the financial ability to return the station to operational status. Thus, AJI not only ignored a Commission directive that it return the station to the air, but it also no longer had the means of reversing that result. Its failure to inform the Commission of that fact resulted in violation of Section 73.1750.

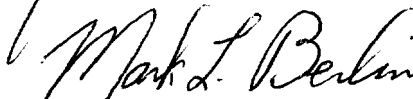
12. In sum, the Bureau continues to believe that AJI has failed to demonstrate its capability and intent to expeditiously resume broadcast operations and that it has violated Sections 73.1740 and 73.1750 of the Rules. Accordingly, we urge the Presiding Judge to

determine that AJI is not qualified to remain the licensee of KYEG and that its license should be revoked.

Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau



Norman Goldstein
Chief, Complaints and Political
Programming Branch



Mark L. Berlin
Attorney
Mass Media Bureau

Federal Communications Commission
2025 M Street, NW, Suite 8202
Washington, DC 20554

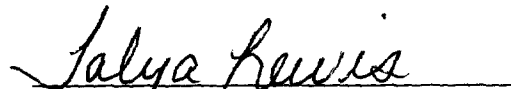
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CERTIFICATE OF SERVICE

I, Talya Lewis, a secretary in the Complaints and Political Programming Branch, Mass Media Bureau certify that I have, on this 8th day of October 1996, sent by regular United States mail, a copy of the foregoing "Mass Media Bureau's Reply to Proposed Findings of Fact and Conclusions of Law" to:

Andrew S. Kersting, Esq.
Fletcher, Heald & Hildreth
11th Floor
1300 N. 17th Street
Rosslyn, VA 22209-3801

A. Jack Inman
AJI Broadcasting
2645 James B. White Highway North
Whiteville, NC 28472


Talya Lewis